LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U. S.
FILED
NOV 1 1961
JOHN F. DAVIS, CLERK

No. 466

In the Supreme Court of the United States

OCTOBER TERM, 1961

EDWARD BROWDER, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,

HERBERT J. MILLER, JR.,
Assistant Attorney General,

BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys,

Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute and rules involved	2
Statement	3
Argument	7
Conclusion	9

CITATIONS

Cases:

Chargois v. *United States*, 267 F. 2d 410	8
Dunbar v. *United States*, 156 U.S. 185	8
Hagner v. *United States*, 285 U.S. 427	8
Norris v. *United States*, 152 F. 2d 808, certiorari denied, 328 U.S. 850	8
United States v. *Debrow*, 346 U.S. 374	7
United States v. *Neff*, 212 F. 2d 297	8

Statute and rules:

18 U.S.C. 2315	2
Federal Rules of Civil Procedure:	
Rule 75(n)	3, 5, 9
Federal Rules of Criminal Procedure:	
Rule 7(c)	2
Rule 39(b)	3, 5

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 466

EDWARD BROWDER, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 292 F. 2d 44.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 1961. A petition for rehearing was denied on August 1, 1961. On August 29, 1961, Mr. Justice Black extended the time for filing a petition

for certiorari to and including September 30, 1961. The petition for a writ of certiorari was filed on September 30, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the indictment, as supplemented by a bill of particulars, sufficiently advised petitioner of the offense with which he was charged.

2. Whether the indictment stated an offense.

3. Whether petitioner's conviction should be reversed because of alleged error in the court's handling of a suggestion that an impropriety had occurred outside the presence of the court.

STATUTE AND RULES INVOLVED

In pertinent part, 18 U.S.C. 2315 provides as follows:

> Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of $500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken; * * * * *
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

* * * *

Rule 7(c), F. R. Crim. P., provides in pertinent part:

> The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. * * * * *

Rule 39(b)(1), F. R. Crim. P., provides as follows:

> The rules and practice governing the preparation and form of the record on appeal in civil actions shall apply to the record on appeal in all criminal proceedings, except as otherwise provided in these rules.

Rule 75(n), F. R. Civ. P., provides as follows:

> In the event no stenographic report of the evidence or proceedings at a hearing or trial was made, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection, for use instead of a stenographer's transcript. This statement shall be served on the appellee who may serve objections or propose amendments thereto within 10 days after service upon him. Thereupon the statement, with the objections or proposed amendments, shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the court in the record on appeal.

STATEMENT

After a trial by jury in the United States District Court for the Southern District of Florida, petitioner was convicted of knowingly receiving and concealing securities valued at more than $5,000, stolen from two Canadian banks (Pet. App. 11-12; R. 1-4, 33). He was sentenced to imprisonment for three years

on count 2 of the indictment, while sentence on count 4 was suspended and he was placed on probation for a period of three years, to begin upon his discharge from confinement on count 2 (R. 54).[1] The court of appeals affirmed (Pet. App. 1-10). Petitioner's contentions relate only to two matters—the sufficiency of the indictment, as supplemented by the bill of particulars, to advise him of the offense with which he was charged, and the manner in which the court handled a suggestion as to an alleged irregularity taking place out of the presence of the court. The record as to these two matters may be summarized as follows:

1. Count 2 of the indictment charged that on or about March 2, 1959, at Miami, Florida, petitioner knowingly received and concealed securities valued at more than $5,000, stolen from the Brockville Savings and Trust Company, of Brockville, Ontario, Canada. The securities were alleged to be certain described bonds of the Dominion of Canada, of the City of Windsor, Ontario, of the Province of Manitoba, "and other Canadian bonds, which constitute interstate commerce". Count 4 made a similar

---

[1] The indictment, consisting of six counts (R. 1-4), was consolidated for trial with another indictment charging petitioner and one Ferrara with conspiracy to do the substantive acts here charged (R. 7-8). At the trial, the court sustained a motion for a judgment of acquittal in the conspiracy case at the conclusion of the government's evidence (Pet. App. 4), and a similar motion as to counts 5 and 6 of this indictment at the conclusion of all the evidence (R. 31). The jury acquitted as to counts 1 and 3 and convicted on counts 2 and 4.

charge concerning securities stolen from the Caisse National D'Economie Insurance Company of Montreal. The securities were alleged to be bonds of the City of Longueuil, Quebec, of the City of Pont-Viau, Quebec, of the City of Ste. Rose, Quebec, "and other Canadian securities".

The bill of particulars filed by the government stated that the securities referred to in count 2 were bonds of the City of Windsor, totaling $7,000, bonds of the Province of Manitoba, totaling $2,000, bonds of the Dominion of Canada, totaling $78,000 (the three obligors named in count 2), and a bond of the St. Lawrence Corporation in the amount of $1,000. It listed under count 4 bonds of the City of Longueuil, totaling $2,000, bonds of the City of Pont-Viau, totaling $3,000, bonds of the City of Ste. Rose, totaling $1,000, and bonds of the City of Ste. Therese, totaling $4,000. As to each bond full details were given, *i.e.*, denomination, serial number, interest rate, maturity date, issue date, and the oldest coupon thereon (Pet. App. 13-19).

2. In purported compliance with Rule 75(n), F. R. Civ. P., made applicable by Rule 39(b)(1), F. R. Crim. P., *supra*, p. 3, petitioner filed a "Statement of Portion of the Trial not Stenographically Reported." This was done after petitioner's motion for new trial had been denied and notice of appeal had been filed (R. 58-60). The United States Attorney objected to this procedure, stating that his memory of the colloquy included in the "Statement" was different from that of petitioner's attorney, that the

procedure followed by counsel was not in accordance with the Rule, and that petitioner had disregarded the judge's suggestion that the matter be brought to his attention after the verdict was returned (R. 62-63).[2]

---

[2] The full text of the "Statement" reads as follows (Pet. App. 31-33):

MR. BOOTH (Defense Counsel Richard R. Booth, addressing U. S. District Judge Emett C. Choate):

> Your Honor, my client, his wife and I have just overheard a portion of a conversation which I believe should be brought to the attention of the Court. As the three of us were approaching this courtroom we observed several persons conversing amiably in the east hall on this floor near the Clerk's Office. Those participating in this conversation were Government witness Cox, juror Vincent W. Africano, Jack Ancher and John Ashe, both of whom were peremptorily excused from service on the jury in this case by myself. We overheard the Government witness, Mr. Cox, say to Mr. Africano, the juror: "Oh, is he on the jury? Well, I'll have to talk to him. He sold me a car not so long ago." I call to the Court's attention that William M. Sands, a member of the jury, is with a Miami automobile dealer, Luby Chevrolet, which leads me to conclude that the Government witness was talking about Mr. Sands. Since all the members of the jury said under oath that they did not know any of the Government witnesses when a list was read to them and since any contact between members of the jury and persons other than counsel is highly irregular and has been forbidden by this Court, the non-disclosure and the conversation in the hall may have well been prejudicial to my client, and I think an inquiry should be made to determine whether that is the case, because if Mr. Sands sold Mr. Cox a car, or if the conversation was prejudicial I will want to ask for a mistrial.

MR. BRIGGS (Assistant U. S. Attorney John L. Briggs prosecuting the case):

> I think the procedure to be used in situations like this

No attempt was made to have the court settle and approve the statement, as required by the Rule.

ARGUMENT

1. The bill of particulars filed in this case properly performed its function of making more specific the allegations of the indictment. It not only gave additional details as to the securities specified in the indictment, it informed petitioner that the "other Canadian bonds" referred to in count 2 were a bond of the St. Lawrence Corporation in the amount of $1,000, also specifically described. The information thus furnished was more than adequate to advise petitioner of the charges made against him and to protect him against subsequent prosecution for the same offenses. *United States* v. *Debrow*, 346 U.S. 374. Petitioner's professed fear that there may be still other Canadian bonds not listed in the bill of particulars which the United States Attorney is holding back for later

---

is to proceed with the trial and then have an inquiry after the verdict has been returned.

JUDGE CHOATE (Presiding Judge Emett C. Choate):

Yes, that is true; so let us proceed with the trial. If after the verdict is returned you feel that an inquiry should be made, recall the incident to the Court and we shall look into the matter.

WALTERS, MOORE & COSTANZO
and RICHARD R. BOOTH,
Attorneys for Defendant-Appellant.

By Richard R. Booth

prosecution is without any basis. The purpose of a bill of particulars is to limit the general allegations of an indictment so as to eliminate the possibility of subsequent prosecution, and it thus becomes conclusive as to the rights of the parties. *Norris* v. *United States*, 152 F. 2d 808, 811 (C.A. 5), certiorari denied, 328 U.S. 850; *United States* v. *Neff*, 212 F. 2d 297 (C.A. 3).

2. Petitioner criticizes as meaningless the phrase used in the indictment, "which constitute interstate commerce" (Pet. App. 11-12). It is perhaps true that too slavish an adherence to the language of the statute produced a maladroit form of expression and that it would have been better to say that the bonds had constituted securities in interstate or foreign commerce. However, this inartificiality in draftsmanship is of no significance after verdict. *Dunbar* v. *United States*, 156 U.S. 185, 192; *Hagner* v. *United States*, 285 U.S. 427, 433. The allegation that bonds stolen from two Canadian banks were received and concealed in Miami made it perfectly clear that the securities were necessarily in interstate or foreign commerce, or both, and the sufficiency of the evidence to prove such commerce is not challenged. No prejudice to petitioner could possibly have resulted from the awkward form of the pleading. *Chargois* v. *United States*, 267 F. 2d 410, 411 (C.A. 9).

3. The court of appeals properly disposed of the contention relating to an alleged irregularity taking place outside the presence of the court by pointing out that petitioner's "Statement of Portion of the Trial not Stenographically Reported", which was pur-

portedly filed pursuant to Rule 75(n), F. R. Civ. P., did not comply with the Rule. There was no attempt to have this *ex parte* statement approved by the court, which the Rule requires before it becomes a part of the record.

In addition, petitioner acquiesced in the court's suggestion that the matter be deferred until after verdict, when it could be called to the court's attention if counsel considered it to be of sufficient importance. Counsel apparently did not consider the matter to be of enough significance for further attention and the subject matter of the purported conversation would seem to justify that conclusion. See footnote 2, *supra*.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys.

NOVEMBER 1961

☆ U. S. GOVERNMENT PRINTING OFFICE, 1961 817031 508